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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO LOPEZ, Defendant and Appellant.	G055475 (Super. Ct. No. 15CF0005) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Amanda Lloyd and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Guillermo Lopez was sentenced to 25 years to life for sexually abusing a child. On appeal, he contends the prosecutor engaged in prejudicial misconduct, his sentence is cruel and unusual, and the abstract of judgment contains a clerical error. Appellant is right about the clerical error, and we direct the trial court to correct it. Finding appellant's other contentions unavailing, however, we affirm the judgment.

FACTS

Appellant had a rosary service in his front yard to commemorate the death of his mother-in-law. Among the people who attended were Kimberly R., appellant's nine-year-old neighbor, and her family. During the service, Kimberly and her younger brother went inside appellant's house to see some puppies in the living room. They were only there a few minutes before appellant entered the room and began touching Kimberly inappropriately. While her brother was looking the other way, appellant groped Kimberly's breasts and vagina over her clothing, then he led her into the rear bedroom of the house.

Inside the bedroom, appellant pulled down Kimberly's shorts and underwear and touched her genital area. Then he put his penis – which Kimberly described as his "thing" – in her butt. The penetration was uncomfortable to Kimberly and lasted about a minute. When it was over, Kimberly put on her clothes, went outside, and told her mother Maria about the incident.

Maria immediately confronted appellant, and they had a brief altercation inside the house. For his part, appellant denied any wrongdoing, insisting he only touched Kimberly to protect her from one of the dogs that was growling at her. He also told Maria not to call the police because he did not want any problems with his wife. They were summoned anyway and while they were en route, Maria examined Kimberly in the bathroom and noticed the inside of her buttocks was a little red.

Kimberly told the police that appellant took off her clothes and touched her breasts, butt and vagina. She also said appellant put his penis on her vaginal area and butt. Kimberly did not allege any penetration, and her forensic medical exam revealed no signs of sexual abuse. But when interviewed by a member of the Child Abuse Services Team, she said appellant touched her private areas and put his "thing" in her butt.

As part of the investigation, Aimee Yap, a scientist at the county crime lab, analyzed skin swabs that were collected from Kimberly during her forensic medical exam. Yap found DNA matching appellant's DNA profile on the swab of Kimberly's right breast and the swab of her vulva. Yap estimated the odds of those matches occurring randomly as one in a trillion, and one in five million, respectively. She also said appellant could not be eliminated as the source of DNA that was found on the swab of Kimberly's anal area.

At trial, appellant presented testimony from several witnesses who vouched for his good character and assailed Maria as a dishonest person who would do anything to get her citizenship papers. Appellant also presented expert testimony that he does not fit the profile of a child sex offender. He called Dr. Steven Gabaeff, a specialist in forensic medicine and DNA analysis. According to Dr. Gabaeff, the DNA sample collected from Kimberly's anal area was contaminated, and it most likely came from saliva, not a penis. Aditionally, the lack of physical injury to Kimberly's anal area was inconsistent with her claim of penetration. Although Dr. Gabaeff did not dispute appellant's DNA was found on Kimberly, he suspected it was transferred there by someone.

In closing argument, defense counsel asserted that "someone" was Maria. Counsel theorized that when Maria confronted appellant in his house, she got some of his DNA on her and then transferred it to Kimberly when she examined her in the bathroom. Counsel submitted the transfer could have been accidental or by design, but either way, it was enough to create reasonable doubt about the truth of the charges against appellant.

The jury did not see it that way. It convicted appellant of sodomizing Kimberly and committing three other lewd acts against her. It also found appellant engaged in substantial sexual conduct with Kimberly. The trial court sentenced him to prison for 25 years to life on the sodomy count, and on the remaining counts it either stayed sentence or imposed a concurrent term.

I

Appellant first contends the prosecutor committed prejudicial misconduct in derogation of his fair trial rights by shifting the burden of proof to the defense and maligning his attorney. We disagree.

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights . . . but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 157.)

Appellant cites two instances of alleged burden shifting by the prosecutor, the first of which occurred during the questioning of Aimee Yap, the state's DNA expert. Due to scheduling issues, Yap testified after Dr. Gabaeff, the DNA expert for the defense. He opined the analysis of the DNA sample collected from Kimberly's anal area was unreliable because the sample was contaminated. In apparent response to that opinion, the prosecutor asked Yap if the defense could have conducted its own testing of the sample. Before Yap answered the question, defense counsel objected, "Improper shifting of the burden," and the court sustained the objection. The prosecutor then asked Yap if she would have been able to accept requests from other parties who were interested in

testing the sample. That prompted the same objection from defense counsel, and the court instructed the prosecutor to move on to another topic. She did eventually, but not before asking Yap a few more questions about whether the sample was available for additional testing.

The second alleged instance of burden shifting occurred during closing argument. In his closing, defense counsel urged the jurors to make sure the state's case was rock solid before they returned a conviction. He said, "You can't let them slide because make no mistake about it, you are not here for the benefit of [the prosecutor] and the prosecution. You're here for the benefit of [the defendant]. You're here to protect him, to make sure he doesn't get steamrolled by the government, that you hold them to their burden of proof beyond a reasonable doubt."

In her rebuttal argument, the prosecutor took umbrage at those remarks, describing them as a "gross misstatement of the law[.]" She told the jurors their obligation was not just to protect the defendant and his rights, but to be fair all around. "I'm not just sitting here for fun," she said, "I have a client as well. I have an interest in providing a fair trial for both sides. So this isn't let's protect the defendant. No. Let's find the truth and let's render a verdict based solely on the truth."

Appellant did not object to this argument, raising the specter of forfeiture. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) But even if he had, we are not convinced it constituted improper burden shifting. It appears the prosecutor was simply pointing out that both parties in a criminal trial are entitled to a fair trial. There was nothing wrong with her disabusing the jurors of the notion conveyed by defense counsel's improper argument that they were there solely for the benefit of defendant. Moreover, the prosecutor was quick to recognize the burden of proof was on the state. In that regard, she correctly informed the jury that burden required her to prove the charges beyond a reasonable doubt.

As for the questioning of Yap, it was not improper for the prosecutor to ask her whether the subject DNA sample was available for independent testing. (See *People v. Cook* (2006) 39 Cal.4th 566, 607 [prosecutor did not shift the burden of proof by eliciting testimony regarding the feasibility of independent testing of contested physical evidence].) Moreover, Yap never did answer the two particular questions the defense objected to. And the record shows the trial court instructed the jury multiple times that the burden of proof was on the prosecution to prove the charges beyond a reasonable doubt. That is something the parties repeatedly made clear in their closing arguments as well. Given everything the jurors were told, it is not reasonably likely they misconstrued the burden of proof in making their decision. Thus, the challenged actions are not cause for reversal.

Appellant also accuses the prosecutor of making inappropriate and derogatory remarks about his attorney. He relies on the very first comments the prosecutor made in her rebuttal argument, which were: "I'm really glad that the court began this whole closing argument process by informing you that what the attorneys say is not evidence. The evidence is what you heard from the witness stand. Because that closing argument by [defense counsel] . . . had gross[,] and by gross I mean large and disgusting[,] misstatements of the evidence in this case." Defense counsel objected to this argument as "improper," but the court overruled his objection. The prosecutor then went on to discuss the particular testimony that she believed defense counsel had mischaracterized in his closing argument.

Appellant contends that by using the terms "gross" and "disgusting," the prosecutor was trying to "persuade the jury to find defense counsel to be dishonest" and "turn the jurors against [him] on a personal level[.]" However, the prosecutor did not apply those terms to defense counsel; rather, she used them to describe his alleged misstatements of the evidence. While personal attacks on opposing counsel are wholly improper (*People v. Welch* (1999) 20 Cal.4th 701, 753), "the prosecutor has wide latitude

in describing the deficiencies in opposing counsel's tactics and factual account. [Citations.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Thus, it was not improper for the prosecutor to argue defense counsel had construed the facts in a manner contrary to what the evidence had shown (*People v. Redd* (2010) 48 Cal.4th 691, 740), and the argument does not provide grounds for reversal.

II

Appellant also contends his sentence is cruel and unusual. Again, we disagree.

At sentencing, the trial court acknowledged this was a difficult case because appellant had no prior record, and according to the Static-99 actuarial test, his risk of recidivism is below average. However, the court also recognized appellant was convicted of "very serious charges," and the effect of his conduct on Kimberly "certainly could be devastating." In the end, the court felt powerless to deviate from the mandatory sentence for child sodomy, which is 25 years to life in prison. (Pen. Code, § 288.7, subd. (a).) Therefore, it sentenced appellant to that term.

Appellant argues his sentence violates the constitutional proscription against cruel and unusual punishment. (See U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.) Given that he did not bring up this issue at the time of sentencing, the forfeiture rule would typically preclude appellate review. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247.) However, because appellant contends his attorney was remiss for failing to raise the issue below, we will consider his argument on the merits to foreclose a future habeas petition based on ineffective assistance of counsel.

For the most part, sentencing is a legislative prerogative. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 998.) Although courts are entrusted to safeguard the constitutional prohibition against cruel and unusual punishment, successful challenges to a particular sentence based on that prohibition are extremely rare. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["exquisite rarity"].) Absent gross disproportionality in

the defendant's sentence, no Eighth Amendment violation will be found. (*Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63.) Similarly, a sentence will not be found unconstitutional under the state Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441; *In re Lynch* (1972) 8 Cal.3d 410, 424.) "Under both standards, the court examines the nature of the offense and the defendant, the punishment for more serious offenses within the jurisdiction, and the punishment for similar offenses in other jurisdictions." (*People v. Mendez* (2010) 188 Cal.App.4th 47, 64.)

As for the nature of appellant's offenses, the record shows he committed lewd acts against Kimberly while her younger brother was present, and then he led her into a secluded bedroom where he further molested and sodomized her. It cannot be gainsaid that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244.) Granted, this is the first time appellant has ever been convicted of a crime, and he did not employ force or violence in victimizing Kimberly. However, "he did not have to hurt her in order to do permanent psychological damage." (*People v. Reyes* (2016) 246 Cal.App.4th 62, 85.) The seriousness of his conduct clearly militates against a finding his sentence is cruel and unusual. (See *id*. at pp. 82-90 [upholding sentence of life without parole for child sex offender who was convicted under California's One Strike Law]; *People v. Gomez* (2018) 30 Cal.App.5th 493 [upholding indeterminate life term for first time child sex offender].)

Appellant contends his sentence is disproportionate compared to the penalty for more serious offenses in California, such as first-degree murder, which, like appellant's crime, carries a mandatory penalty of 25 years to life in prison. (See Pen. Code, § 190, subd. (a).) However, it is not unconstitutional for a state to punish nonhomicide crimes as seriously as homicide crimes. (See, e.g., *Harmelin v. Michigan,*

supra, 501 U.S. 957 [upholding sentence of life without the possibility of parole for a defendant who possessed a large quantity of cocaine].) This is particularly true when the crime targets children, who are society's most vulnerable victims. (See generally *People v. Scott* (1994) 9 Cal.4th 331, 341-342 [recognizing special laws are needed to protect children because they are uniquely susceptible to sexual exploitation].)

Moreover, when compared to the punishment meted out to other sex offenders who take advantage of children in California, appellant's sentence is not out of proportion. (See Pen. Code, § 269 [mandating indeterminate life sentence for a variety of child sex crimes].) And while appellant's punishment is certainly severe, it is on par with, or less than, the sentence prescribed for child sodomy in other jurisdictions. (See, e.g., Fla. Stat. §§ 794.011, subds. (1)(h), (2)(a) & 775.082, subd. (1)(a) [life without parole]; Kan. Stat. §§ 21-5501, subd. (b), 21-5504, subd. (b)(1) & 21-6627, subd. (a)(1)(D) [25 years to life]; Nev. Stat. §§ 200.364, subd. (9) & 200.366, subds. (1)(b), (3)(c) [35 years to life]; Tex. Pen. Code, §§ 22.021, subds. (a)(1)(B)(i), (a)(2)(B), (e) & 12.32, subd. (a) [up to 99 years].) Therefore, we find no intra or inter-jurisdictional disproportionality in this case.

In light of all the relevant considerations, we are satisfied appellant's sentence comports with constitutional limitations respecting excessive punishment. It is not cruel or unusual.

III

Lastly, the parties agree the abstract of judgment contains a clerical error in that it erroneously omits appellant's conviction for lewd conduct on count 2 in the determinate sentence section of the abstract. Because it is "important that courts correct errors and omissions in abstracts of judgment" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), we direct the trial court to remedy this oversight.

DISPOSITION

The judgment is affirmed. The trial court is directed to include appellant's lewd conduct conviction on count 2 in the determinate sentence section of the abstract of judgment and mark the box indicating the court stayed imposition of sentence on that count pursuant to Penal Code section 654. The court shall also forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.